REMARKS

Claims 1-15 and 39-42 were pending in this application prior to the outstanding Office Action. Claims 16-38 were previously withdrawn.

The Examiner has rejected claims 1, 2 and 8-15 under 35 U.S.C. 102(e) as being anticipated by Beyer et al. (U.S. 6,798,249). The Examiner has also rejected claims 6-7, 39 and 42 under 35 U.S.C. 103(a) as being unpatentable over Beyer et al. (U.S. 6,798,249). Claims 3, 40 and 41 are also rejected under 35 U.S.C. 103(a) as being unpatentable over Beyer et al. (U.S. 6,798,249) in view of Technology Strategy, Inc. (www.grossprofit.com). The Examiner has also rejected claims 4-5 under 35 U.S.C. 103(a) as being unpatentable over Beyer et al. (U.S. 6,798,249) in view of Crosswhite (U.S. 6,611,726).

Independent claims 1 and 39 are amended to refer to ~~associating~~ cloning daily sales history data for sales of a ~~cloned~~ good at a plurality of selling locations ~~with~~ from actual daily sales history data of an other good sold at the plurality of selling locations. Support for using daily sales history appears in the last paragraph of application page 4. Support for using actual sales history data appears throughout the application. No new matter is intended to be introduced by the amendment.

Applicants' Petition Under 37 CFR § 1.144

On June 5, 2006, Applicants filed a petition under 37 CFR § 1.144 to be decided by the Technology Center Group Director regarding an improper restriction requirement made final by the Examiner in the April 5, 2006 Office Action (the "OA"). We understand from the SPRE that the petition was mistakenly routed to the Examiner instead of the SPE and will be taken up soon.

Rejection Under 35 U.S.C. § 102(e) of Claims 1, 2, 8-15

The Examiner rejects **claims 1, 2, 8-15** under 35 U.S.C. § 102(e) as anticipated by Beyer et al. (U.S. 6,798,249).

Claim 1

Claim 1, as amended, includes the limitations:

A computer implemented method of supplying a sales history for a good lacking a sales history, including:

~~associating~~ cloning daily sales history data for sales of a ~~cloned~~ good at a plurality of selling locations ~~with~~ from actual daily sales history data of an other good sold at the plurality of selling locations;

scaling the ~~associated~~ cloned daily sales history data upward or downward based on anticipated sales of the other good;

tracking actual sales of the other good for an interval; and

rescaling the ~~associated~~ cloned daily sales history data based on actual sales of the other good during the interval.

These limitations are not found in Beyer et al.

Beyer et al., assigned to HP, concerns manufacturing level demand forecasting. It does not anticipate the steps above. It does create a cloned sales history for goods at particular selling locations. It does not scale a cloned daily sales history for individual selling locations. It does not rescale cloned daily sales history data.

In general, we claim creating a particular form of cloned daily *past* sales history data for a new product on a location by location basis, rather than a monthly *future* demand curve for a new product.

Beyer et al. depict the overall process in FIG. 1:

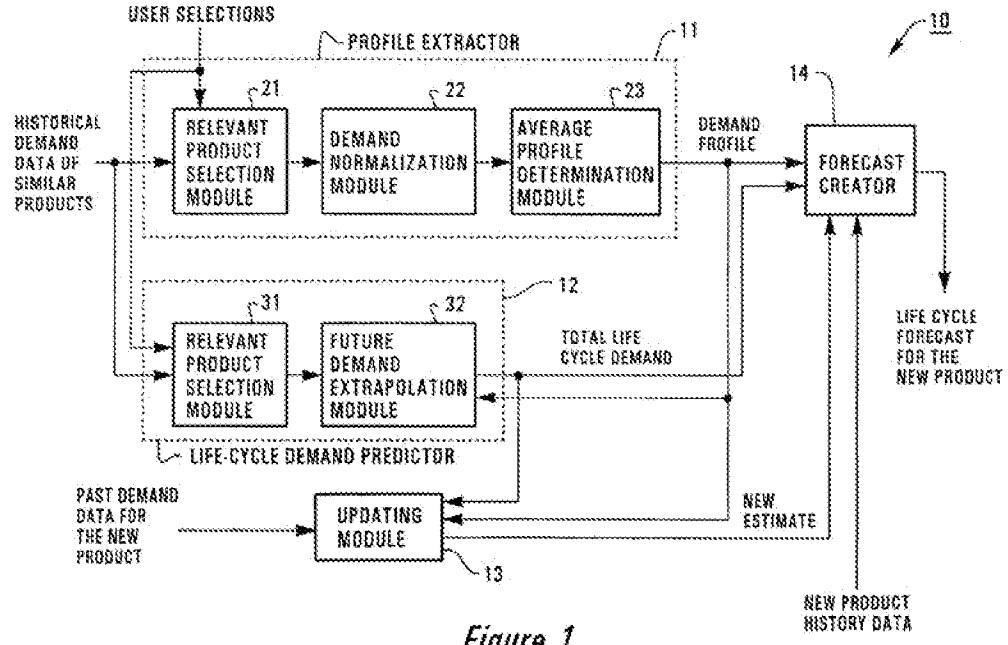

Figure 1

The process depicted does not produce a cloned past sales history, it produces an averaged demand future curve. The figures on which the Examiner relies, figures 2 and 3, do not depict producing a cloned sales history. The accompanying text for step 52 of figure 2 (col. 6-7) describes a temporary data file or data stream that includes extracted historical data. This temporary data file or data stream apparently is discarded once it is normalized and averaged. It is not a persistent cloned daily history file or reference that is subject to scaling or future analysis in light of actual sales. The description of figure 2 in column 7 particularly refers to monthly cumulative projected demand curve, as opposed to cloned daily sales data.

The first passage on which the Examiner relies teaches away from creating cloned daily sales history data, more than suggesting it. The passage in column 1 is vague about the type of data hypothetically proposed to be used, referring to demand for products as a whole, rather than the history of sales at specific selling locations. At lines 35-40, the reference describes many problems with potentially using historical demand data of similar products. This is what it means to teach away.

The passage in column 2 describes the demand profile extractor that leads to production of a normalized and averaged lifecycle demand forecast curve, rather than a cloned daily sales history. The passage in column 3 is general in the production to the application which does not include any of the claimed details.

The two passages in column 4 first summarize how a new product can be described and the system can automatically select similar past products. This has nothing to do with claim one. The passages next described the extraction of historical sales data, without attributing that data to any sales location and without any mention of granularity. The extracted sales data is used to produce a cumulative future demand profile in the form of a demand curve, not cloned daily sales histories for a plurality of sales locations. A life cycle demand predictor is described, which does not anticipate any element of the claim. In summary, the passages in column 4 are not relevant to the claimed limitations.

Another passage from column 4, lines 63-66, cited against the scaling step, reveals detail about the Beyer et al. process that plainly contrasts it with the claim language.

external historical demand data database. For each similar product, the life-cycle demand predictor **12** calculates the run-rate (i.e., the average demand per time period during the mature phase of the product's life) and associates it with the date that represents the midpoint of the product's life. The run-rate can be units sold per month. Using linear regression and extrapolation on the date-run-rate pairs, the life-cycle demand predictor **12** calculates an estimate of the run-rate at the date of the midpoint of the life-cycle of the new product. From the predicted run-rate and the product demand profile of the new product (i.e., the average product profile of the similar products), the life-cycle demand predictor **12** finally computes an estimate for the total life-cycle demand of the new product. This estimate is either sent to the forecast

This passage makes it clear that no cloned daily sales history is produced by Beyer et al.

The passage in column 8, lines 64-67 equates the future demand extraction module 32 in figure 1 with the step 52 of figure 2, which is described above. The future demand extraction module creates a temporary file or data stream that includes extracted historical data, which is discarded once it is normalized and used for creation of a future monthly cumulative demand curve. This does not read on the claimed limitations.

The passage spamming columns 9-10 again refers to the resulting future cumulative demand curve. This passage is no closer to what we claim than the other passages distinguished above.

Therefore, claim 1 is not anticipated by Beyer et al.

Claim 2

Claim 2 includes the limitations:

wherein the rescaling takes place after the interval without intervention of a user

These limitations are not found in Beyer et al., because the references automatic rescaling is not the claimed rescaling of cloned daily sales history data, the clone data being identified in the cloning step as data for a good at a plurality of selling locations.

Therefore, claim 2 is not anticipated by Beyer et al.

Claims 8 and 9

Claims 8 and 9 include the limitations:

wherein scaling the cloned daily sales history data includes modifying the cloned daily sales history data

The sense of modifying in this claim is modifying the data set, rather than producing another data set and retaining the unmodified cloned daily sales history data. These limitations are not found in Beyer et al., because Beyer et al. does not produce a persistent cloned daily sales history data, it produces only intermediate data for calculation of a monthly cumulative demand curve. There is no sense in which a persisted data set is modified and retained.

Therefore, claims 8 and 9 are not anticipated by Beyer et al.

Claims 10, 11, 14 and 15

Claims 10, 11, 14 and 15 include the limitations:

wherein scaling the cloned daily sales history data includes storing a scaling factor to be applied to the cloned daily sales history data

wherein rescaling the cloned daily sales history data includes storing a scaling factor to be applied to the cloned daily sales history data

These limitations are not found in Beyer et al.

The cited passages in columns 4, 7, 8, 9 and 10 reveal many details of normalization and future demand extrapolation. The process described in column 7 involves creating a scaled cumulative demand function and applying linear interpolation to derive a continuous function on the interval [0, 1]. The creation of a continuous function is contrary to scaling a cloned daily sales history by storing a scaling factor that applies to the discrete data.

Therefore, claims 10, 11, 14 and 15 are not anticipated by Beyer et al.

Claims 12 and 13

Claims 12 and 13 include limitations similar to those in claims 8 and 9.

Therefore, claims 12 and 13 are not anticipated by Beyer et al. for at least the same reasons that claims 1, 8 and 9 are not anticipated.

Applicants respectfully submit that claims 1, 2, 8-15 are not anticipated by Beyer et al.

Rejection Under 35 U.S.C. § 103(a) of Claims 6-7, 39 and 42

The Examiner rejects **claims 6-7, 39 and 42** under 35 U.S.C. § 103(a) as unpatentable over Beyer et al. (U.S. 6,798,249) in view of official notice and examiner opinions.

Claims 6-7

Claims 6-7 include the limitations:

> *wherein cloning daily sales history data includes creating a reference to the sales history data*

These limitations are not found in Beyer et al. in view of official notice.

The Examiner relies on official notice to create a cloned daily sales history by reference (e.g., a pointer to data stored for other purposes), without any basis for making obvious creation of a cloned daily sale history for a plurality of sales locations. It is difficult to see how official notice can be combined with a reference that does not teach the basic element sought to be extended by official notice.

Applying the proposed official notice to Beyer et al. would not produce the claimed result. Using an object that references the historical database (OA at 5-6) in Beyer et al. as part of the process described by Beyer et al. would not change the process at all. The result would still be to throw away intermediate data files and produce a normalized and averaged continuous demand curve, which is not a cloned daily sales history.

Therefore, claims 6-7 should be allowable over Beyer et al. in view of official notice.

Claim 39

Independent claim 39 includes the cloning, scaling and tracking limitations of claim 1, substituting a comparing action for the rescaling action of claim 1:

> *A computer implemented method of supplying a sales history for a good lacking a sales history, including:*
>
> *cloning daily or more frequent sales history data for sales of a good at a plurality of selling locations from actual daily or more frequent sales history data of an other good sold at the plurality of selling locations;*
>
> *scaling the cloned daily sales history data upward or downward based on anticipated sales of the other good;*

tracking actual sales of the other good for an interval; and

comparing the actual sales of the other good to the sales history data for a set of candidate goods and evaluating whether the sales history of one or more of the candidate goods better matches said actual sales than the cloned daily sales history data of the good.

These limitations are not found in Beyer et al. in view of the Examiner's argument about what would be obvious.

For the record, this claim should be allowable over Beyer et al. because the cloning, scaling and tracking steps are not anticipated, for the reasons given above.

Turning to the comparing step, the Examiner acknowledges that Beyer does not expressly disclose (teach or suggest) the comparing step. (OA at 6)

It is unclear what form of argument the Examiner is making at OA pp. 6-7. The Examiner does not invoke what is well known, take official notice or argue any motivation to modify Beyer et al. Nor does the Examiner cite any particular passages of Beyer et al. as supporting evidence. The argument at OA pp. 6-7 does not meet any of the criteria for an Examiner to make out a *prima facie* case of obviousness.

Beyer et al. admittedly does not teach the comparing step and the only suggestion of record to modify Beyer et al. is the text of claim 39. This use of hindsight as a basis for arguing that it would be obvious to do something entirely different from what Beyer et al. teaches is not a permissible basis for asserting obvious.

Therefore, claim 39 is unobvious over Beyer et al.

Claim 42

Claim 42 includes the limitations:

wherein comparing and evaluating take place after the actual sales interval, without intervention of a user

These limitations are not taught, suggested or motivated in Beyer et al., because comparing and evaluating admittedly are not taught or suggested by Beyer et al. and there is no motivation of record to modify Beyer et al.

Therefore, claim 42 should be allowable over Beyer et al. for at least the same reasons as claim 39, from which it depends.

Applicants respectfully submit that claims 6-7, 39 and 42 should be allowable over Beyer et al. in view of official notice.

Rejection Under 35 U.S.C. § 103(a) of Claims 3, 40 and 41

The Examiner rejects **claims 3, 40 and 41** under 35 U.S.C. § 103(a) as unpatentable over Beyer et al. (U.S. 6,798,249) in view of Technology Strategy, Inc. (A, B and C).

Claim 3

Claim 3 includes the limitations:

> wherein the rescaling takes place repeatedly on a predetermined cycle beginning at the end of the interval, without intervention of a user

These limitations are not found in Beyer et al. in view of TSI A-C.

The Examiner acknowledges that Beyer et al. does not disclose rescaling repeatedly on a predetermined cycle. The Examiner relies on advertising fluff from TSI which does not satisfy the written description or enablement requirements. Reliance on screenshots (advertising fluff) is particularly objectionable because this art unit handled TSI's actual patent applications, which include the level of detail on which an Examiner ought to rely. References "A", "B" and "C" appear to be entitled to a March 2, 2000 effective date, but not a 1998 date, on the record assembled thus far. The URL reported in the footer of the printed pages shows that they were retrieved from web.archive.org's "Wayback Machine", not from google.com, Stores Magazine or The Boston Globe. Applicants reached the same pages by following the "Mar 02, 2000" link. http://web.archive.org/web/*sa_/http://www.grossprofit.com/ ("2000" column). Accordingly, none of the material provided by the Examiner is entitled to a 1998 date, on the record.[1]

Applicants are properly careful about attributing an early date to work by TSI / grossprofit.com / ProfitLogic, because a market overview by Alan L. Montgomery, "*The Implemenation Challenge of Pricing Decision Support Systems for Retail Managers*", http://www.andrew.cmu.edu/user/alm3/papers/pricing%20dss.pdf print date 26 March 2004, accessed 16 January 2005, at p. 2, indicates that ProfitLogic's first price optimization software was introduced in 2001, which puts it as much as 11 ½ months after the filing date of this application. Three patent applications by TSI's inventors all were filed after this patent application and do not qualify as prior art, as explained

below. And the grossprofit.com web site might be dated by the claim in reference A, page 1, section 1, that a patent application was pending.

(We have raised this objection in our response of May 26, 2005 in this case and the Examiner acquiesced, so we hope for the same response this time.)

The best of TSI that the Examiner has to rely on is the passage from reference A, page 4, which reads, "during the season, the model is used to analyze actual weekly sales and inventory data to determine for each category of merchandise markdown and allocation decisions that will result in maximum gross margin dollars." This does not disclose rescaling cloned historical sales; it says to devise a markdown strategy. So the premise that TSI teaches weekly rescaling is mistaken.

Without evidence or technical reasoning, the Examiner asserts that it would be obvious to one of skill in the art to do something daily instead of weekly or monthly "in order to increase the speed to action of the system by causing the assessment to occur on a definable, on-going basis." This is contrary to human nature and experience; Applicants respectfully require an affidavit or declaration from the Examiner as evidence of the asserted obviousness. In common experience, many things are done weekly, such as girls' Saturday soccer games or Wednesday practices for a recreational team. It would not be obvious or practical to schedule daily games or even daily practices for a recreational team. The Federal Circuit's standard *In re Lee*, applies to the Examiner's obligation to produce evidence and reasoning. The MPEP, Section 2144.03, provides guidance as to what more the Examiner must provide:

> If the applicant traverses such an assertion the examiner should cite a reference in support of his or her position.
>
> When a rejection is based on facts within the personal knowledge of the examiner, the data should be stated as specifically as possible, and the facts must be supported, when called for by the applicant, by an affidavit from the examiner. Such an affidavit is subject to contradiction or explanation by the affidavits of the applicant and other persons. See 37 CFR 1.104(d)(2).

In the absence of a proper affidavit and for failure of the premise about weekly rescaling by TSI, claim 3 should be allowable over Beyer et al. in view of TSI A-C.

Claim 40

Claim 40 includes the limitations:

wherein the actual sales interval includes a plurality of causal periods and

evaluating takes place on a causal period by causal period basis

These limitations are not found in Beyer et al. in view of TSI A-C.

The references do not come close to the claimed concept. The Examiner acknowledges that Beyer et al. does not teach or suggest that sales intervals will include causal periods or that actual sales of a good and historical sales of candidate goods would be segmented by time range and compared segment-by-segment to determine whether one of the candidate goods sales histories better match than the initially cloned sales history. This is in addition to the acknowledgement that Beyer et al. does not suggest the comparing step of claim 39 at all.

TSI A-C does not come close to the claimed concept, in the context of claim 39 as a whole. TSI must provide an enabling written description that matches all limitations of the comparing step, as modified by dependent claim 40, and there must be a teaching, suggestion or motivation to combine that aspect of TSI with Beyer et al. to make out a *prima facie* case of obviousness.

Applicants' position is that TSI does not teach the comparing step with causal periods. In our May 26, 2005 response, to which the Examiner has had ample opportunity to respond, we explained, the phrase "causal period" is given meaning on pages 2-4 of the application, including "Selection of a rescaling factor can take into account **causal factors** impacting sales, such as promotions, advertising, reduced selling prices, etc. In this case it is not just a straight comparison of sales but it is a comparison that adjusts for which **causal periods** have been employed on the new item and makes sure that the comparison with the old item has a comparable weighting of the same causal periods. … A **causal calendar** which tracks causal events impacting goods at particular selling locations is useful, if the rescaling factor is to take into account **causal factors**." With this usage of "causal" and "causal period" in mind, the limitations of claim 40 are not found in Technology Strategy, Inc. The Examiner acquiesced in the correctness of our position by not ever responding. (It would be inappropriate to make an office action final, if the Examiner did not intend to acquiesce, because we asserted our position 18 months ago and the intervening papers have not disagreed with us.)

As the Examiner previously acquiesced that TSI does not meet claim 40 in the context of the claim 30 comparing step, claim 40 should be allowable over Beyer et al. in view of TSI A-C.

Claim 41

Claim 41 includes the limitations:

wherein the evaluating takes place on a daily or more frequent period basis

These limitations are not found in Beyer et al. in view of TSI A-C.

As we explained in our May 26, 2005 response, the best that the Examiner has to rely on is the passage from reference A, page 4, which reads, "during the season, the model is used to analyze actual weekly sales and inventory data to determine for each category of merchandise markdown and allocation decisions that will result in maximum gross margin dollars." This does not disclose rescaling cloned historical sales; it says to devise a markdown strategy. So the premise that TSI teaches weekly rescaling is mistaken.

Without evidence or technical reasoning, the Examiner asserts that it would be obvious to one of skill in the art to do something daily instead of weekly "in order to more accurately control inventory volumes by using a smaller unit of measurement." This is contrary to human nature and experience; Applicants respectfully require an affidavit or declaration from the Examiner as evidence of the asserted obviousness. In common experience, many things are done weekly, such as girls' Saturday soccer games or Wednesday practices for a recreational team. It would not be obvious or practical to schedule daily games or even daily practices for a recreational team. The Federal Circuit's standard *In re Lee*, applies to the Examiner's obligation to produce evidence and reasoning. The MPEP, Section 2144.03, provides guidance as to what more the Examiner must provide:

> If the applicant traverses such an assertion the examiner should cite a reference in support of his or her position.
>
> When a rejection is based on facts within the personal knowledge of the examiner, the data should be stated as specifically as possible, and the facts must be supported, when called for by the applicant, by an affidavit from the examiner. Such an affidavit is subject to contradiction or explanation by the affidavits of the applicant and other persons. See 37 CFR 1.104(d)(2).

In the absence of a proper affidavit and for failure of the premise about weekly rescaling

by TSI, claim 41 should be allowable over r Beyer et al. in view of TSI A-C.

Applicants respectfully submit that claims 3, 40 and 41 should be allowable over Beyer et al. in view of TSI A-C.

Rejection Under 35 U.S.C. § 103(a) of Claims 4 and 5

The Examiner rejects **claims 4 and 5** under 35 U.S.C. § 103(a) as unpatentable over Beyer et al. (U.S. 6,798,249) in view of Crosswhite (U.S. 6,611,726).

Claims 4 and 5 include the limitations:

> *wherein cloning daily sales history data includes copying the sales history data*

These limitations are not found in Beyer et al. in view of Crosswhite.

The Examiner acknowledges (OA at 10) that Beyer et al. does not disclose coping sales history data to create a cloned daily sales history data set. Of course, because Beyer et al. does not intend to and never ends up with a cloned sales history data set! Beyer et al. intends to throw away intermediate versions of processed data and retain a continuous function over the interval [0, 1] that does not include any bins of historical data, as explained above in the context of claims 10, 11, 14 and 15. This is a probability theory approach that does not resemble claims 4 and 5, as a whole.

The Examiner argues that Crosswhite retrieves a copy of data in the course of performing a forecast. Combining that with Beyer et al. still leads to the copy being discarded after the continuous function over the interval [0, 1] has been calculated, because the principle of operation that Beyer at al. teach, based on probability theory, is to create a smoothed distribution over the interval [0, 1] and discard the original data.

Modification of Beyer et al. to create a persistent cloned daily sales history would be improper because it would change the principle of operation described by Beyer et al. M.P.E.P. 2143.01; see Barry et al., *Obviousness Under 35 U.S.C. 103*, *supra*, pp. 25-26. "As a proposed modification or combination of the prior art should not destroy a reference, the proposed modification or combination should not change the principle of operation of the reference. *In re Ratti*, 270 F. 2d 8 10, 8 13, 123 USPQ 349, 352 (CCPA 1959). This is true even if the combination proposed is operative." Barry et al., *Obviousness Under 35 U.S.C. 103*, *supra*, pp. 25-26; explaining, M.P.E.P. 2143.01. Beyer et al.'s principal of operation is to create a smoothed and normalized cumulative

future demand curve that is nothing like a persistent cloned daily sales history. The mathematical operations that Beyer et al. describe depend on having a continuous curve, rather than bins of historical data. Moving from one mathematical approach to the other is not taught, suggested or motivated and would be an impermissible change in the principle of operation described by the reference.

Therefore, claims 4 and 5 should be allowable over Beyer et al. in view of Crosswhite.

CONCLUSION

Applicant respectfully submits that the pending claims are now in condition for allowance and thereby solicit acceptance of the claims, in light of these amendments.

The undersigned can ordinarily be reached at his office at (650) 712-0340 from 8:30 a.m. to 5:30 p.m. PST, Monday through Friday, and can be reached at his cell phone at (415) 902-6112 most other times.

Fee Authorization. The Commissioner is hereby authorized to charge any additional fee determined to be due in connection with this communication, or to credit any overpayment, to our Deposit Account No. 50-0869 (BLFR 1002-1).

Respectfully submitted,

Dated: 05 October 2006

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